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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

GEORGIA THERESA GILMORE, GUSSIE CARLTON, SYLVIA JOHNSON, J. C. SMITH, MATTIE CARGILL, FRED HARRIS, GEORGE STEPHENS, ELIZABETH BROWN, on behalf of themselves and all others similarly situated,

PETITIONERS,

v.

CITY OF MONTGOMERY, ALABAMA, a Municipal Corporation; BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY; JIM ROBINSON, CLIFF EVANS and J. B. RUCKER, as Members of the Board of Commissioners of the City of Montgomery; RECREATION BOARD OF THE CITY OF MONTGOMERY; RUFUS A. LEWIS, JEAN B. CAMPBELL, JAMES HALL, MUREAL R. CRUMP, CHARLES STAKELY, CHARLES W. ROSS, and JAMES E. VICE, JR., as Members of the Recreation Board of the City of Montgomery; HENRY M. ANDREWS, as Superintendent of the Parks and Recreational Program for the City of Montgomery, Alabama,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT THE CONSTITUTION

DOES NOT PREVENT THE INDIVIDUAL AND NON-EXCLUSIVE USE AND ENJOYMENT OF PUBLIC RECREATIONAL FACILITIES BY INDIVIDUAL CHILDREN OR GROUPS OF CHILDREN, IN COMMON WITH OTHER MEMBERS OF THE PUBLIC, BECAUSE SUCH CHILDREN ATTEND A "ONE RACE" SCHOOL?

II. WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT PRIVATE ORGANIZATIONS, INCLUDING CHURCHES, CIVIC CLUBS, FRATERNAL AND CHARITABLE ORGANIZATIONS, OTHER THAN SCHOOLS, ARE ENTITLED TO USE AND ENJOY PUBLIC RECREATIONAL FACILITIES WITHOUT REGARD TO THE RACIAL ADMISSION POLICIES OF SUCH PRIVATE ORGANIZATIONS?

STATEMENT OF THE CASE

The original complaint in this class action litigation, which commenced more than a decade ago, sought equal access for Negroes to the public parks in Montgomery, Alabama. In the original decision, the District Court (modified and affirmed by the Court of Appeals for the Fifth Circuit) held that while the City was not required to open and operate parks, if municipal parks were operated each must be available for the benefit of all the public regardless of race or color upon a non-discriminatory basis, *Gilmore, et al. v. City of Montgomery, et al.*, 176 F. Supp. 776, 780; 277 F. 2d 364. The City thereafter opened all parks and recreational facilities on a non-discriminatory basis.[1]

1. In a 1970 proceeding the City agreed to upgrade and equalize all municipal recreational facilities and now has in fact substantially complied with its agreement.

In a 1971 motion for supplemental relief, the petitioners asked the District Court to:

"Issue a permanent injunction against defendants, their officers, agents, servants, and employees, restraining them from allowing or in any way sanctioning the use of city owned and operated recreational facilities by any private school, group, club or organization which is racially segregated or which has a racially discriminatory admissions policy."

The City by answer in the District Court took the position that the 1971 supplemental motion was not germane to the original case which sought to obtain and which did obtain equal access to all municipal facilities for all persons, regardless of race. These respondents also asserted in the District Court that the 1971 Motion for Supplemental Relief, in seeking to have the Court compel the municipality to deny groups and organizations equal access to public recreational facilities because of the racial composition of such groups and organizations, was inconsistent with and repugnant to the original class action.

The supplemental motion was submitted to the District Court upon an agreed statement of facts which included the express stipulation that:

"Municipal recreational facilities in the City of Montgomery are not exclusively leased to any particular group and such facilities are not made available exclusively to any particular group. Football, basketball and baseball facilities are made available to groups who make application therefor on a non-discriminatory basis without regard to race or color, including such private groups as churches, athletic leagues, civic clubs, charitable organizations, and educational institutions,

without regard to race or color. Athletic participation which is sponsored by the [Municipal] Parks and Recreation Board, i. e., junior high school age football teams, are given preference in facility scheduling. All municipal recreational facilities throughout the City of Montgomery are open to all on an equal basis with people of the community all having equal access thereto, without regard to race or color."

The District Court in its Order of January 18, 1971, found unconstitutional and enjoined the practice of the City in permitting the use of city owned or operated recreational facilities by any private school or private school affiliated group, which school or group is racially segregated or which has a racially discriminatory admissions policy. The District Court also found unconstitutional and enjoined the practice of the City in permitting the use of city owned or operated recreational facilities by any private group, club or organization which has a racially discriminatory admission policy.

Pending appeal to the United States Court of Appeals for the Fifth Circuit, the District Court granted a stay as to the part of the Order pertaining to private groups, clubs and organizations other than private schools.

The Court of Appeals affirmed the District Court Order with regard to segregated private schools.[2] The Court of Appeals reversed, as "overbroad," the portion of the District Court Order which dealt with private groups, clubs and organizations, other than schools.

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2. The Court of Appeals made the clarification that children who are enrolled in private schools could not be denied the non-exclusive use of municipal recreational facilities, i.e., zoos, museums, parks, in common with the rest of the public.

REASONS FOR DISALLOWANCE OF WRIT

I

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE CONSTITUTION DOES NOT PREVENT THE INDIVIDUAL AND NON-EXCLUSIVE USE AND ENJOYMENT OF PUBLIC RECREATIONAL FACILITIES BY INDIVIDUAL CHILDREN OR GROUPS OF CHILDREN, IN COMMON WITH OTHER MEMBERS OF THE PUBLIC, BECAUSE SUCH CHILDREN ATTEND A "ONE RACE" SCHOOL.

The decision of the Court of Appeals dealing with schools affords the petitioners no judicial basis of legitimate complaint. The petitioners sought and obtained in the Courts below all of the constitutional relief they requested in this regard. The Court of Appeals even held that private schools with open admissions policies are to be prevented from using municipal facilities if the schools are in point of fact all white. The Court of Appeals expressly held that private schools and school affiliated groups which have either a discriminatory admissions policy or which are all white are not to be permitted to use municipal recreational facilities. The petitioners now ask the Supreme Court of the United States to grant certiorari on the issue as to whether children who attend a "one race" private school are to be prohibited from their individual, non-exclusive use of such facilities as zoos, museums, parks and cultural events in common with other members of the public. The Court of Appeals found:

"The nonexclusive enjoyment of municipal recreational facilities by private school children was not proven to present a sufficient threat to desegre-

gated public education to support an injunction restraining the clear personal right of the affected children to enjoy such usage in common with the rest of the public."

It would indeed be harsh and constitutionally unwarranted to deny individual children the right to use, in common with other members of the public, a municipal museum or zoo solely on the basis of the racial composition of the school the child may attend. As stated of the Court of Appeals:

". . . while the Constitution requires public authorities to abstain from assisting certain private schools, 'it does not require the state to be their adversary,' *Everson v. Bd. of Education,* 330 U. S. 1, 18; 67 S. Ct. 504, 513; 91 L.Ed 711 (1947)."

II

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT PRIVATE ORGANIZATIONS, INCLUDING CHURCHES, CIVIC CLUBS, FRATERNAL AND CHARITABLE ORGANIZATIONS, OTHER THAN SCHOOLS, ARE ENTITLED TO USE AND ENJOY PUBLIC RECREATIONAL FACILITIES WITHOUT REGARD TO THE RACIAL ADMISSION POLICIES OF SUCH PRIVATE ORGANIZATIONS.

Both the District Court and the Court of Appeals found that different standards must be applied to schools and school affiliated groups than those applied to private organizations, other than schools.[3] The Court of Appeals in the case of "non-school" private

3. See District Court Order of January 18, 1972, and decision of the Court of Appeals of February 9, 1973.

groups, using public recreational facilities, found from the record "no significant effect on the countervailing rights of excluded individuals." The record, in fact, established, as previously noted, that all recreational facilities in the City of Montgomery are in fact open to all persons without regard to race. The petitioners do not even contend that they, or any members of their class, are excluded from any municipal facilities. The Court of Appeals concluded therefore that "such private groups cannot be denied access to public recreational facilities solely because of their discriminatory admissions policies."

We respectfully submit that the constitutional right of private clubs to choose members as they see fit has been consistently recognized, *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163; 92 S. Ct. 1965; 32 L. Ed 2d. 627 (1972). The freedom to choose one's associates in private clubs, churches, and civic organizations, was recognized by the Court of Appeals below as an important constitutional right and a basic principle of our pluralistic society. The Court cited *Evans v. Newton*, 382 U. S. 296, 298, 299; 86 S. Ct. 486, 488; 15 L.Ed 2d. 373 (1966); *NAACP v. Button*, 371 U. S. 415, 444, 445; 83 S. Ct. 328, 344; 9 L. Ed 2d. 405 (1963); *Emerson, Freedom of Association and Freedom of Expression*, 74 Yale L. J. 1 (1964). In the case sub judice, the exercise of the rights of association has not harmed the petitioners or any of the members of their class. No invidious discrimination was shown or claimed in the courts below. No constitutionally permissible purpose could therefore be served by denying the use of public recreational facilities to private groups who exercise their rights of association.

CONCLUSION

The Respondents respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

JOSEPH D. PHELPS
DRAYTON N. HAMILTON
WALTER J. KNABE
Attorneys for Respondents

June, 1973